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No. 76-1389

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRED MARVEL AND ANGELA MARVEL,
d/b/a MARVEL PHOTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners challenge the refusal of the courts below to enjoin, during the pendency of their suit for refund and abatement, the collection of assessed social security (FICA) taxes (26 U.S.C. 3101), taxes withheld at the source on wages (26 U.S.C. 3401) and unemployment (FUTA) taxes (26 U.S.C. 3301).

The pertinent facts are as follows: Petitioners, doing business as Marvel Photo, operated a photography studio. The Internal Revenue Service assessed Marvel Photo for unpaid FICA, withholding of income, and FUTA taxes and issued to Marvel Photo a "Final Notice Before Seizure." Petitioners paid these employment taxes for one alleged employee of Marvel Photo and brought suit in the United

States District Court for the Northern District of Oklahoma for refund of the taxes paid and abatement of the balance of the assessment (Pet. App. A, p. 16).[1]

In the district court, petitioners moved for a temporary restraining order and preliminary injunction enjoining the Internal Revenue Service from levying upon their assets for the unpaid assessments during the pendency of the litigation (Pet. App. A, p. 16). The district court held that the Anti-Injunction Act, 26 U.S.C. 7421(a), barred petitioners' suit (Pet. App. A, pp. 25-27). The court of appeals affirmed (Pet. App. A, pp. 15-17).

The decision below correctly held that the Anti-Injunction Act barred this action under *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, *Bob Jones University* v. *Simon*, 416 U.S. 725, and *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752. Indeed, *Williams Packing Co.* similarly involved an attempt to enjoin the collection of employment taxes. These decisions hold that "§7421(a) bars pre-enforcement injunctive suits * * * unless the standards of *Williams Packing* are met * * *." *Bob Jones University* v. *Simon, supra*, 416 U.S. at 748, n. 22. Under the standards of *Williams Packing*, a taxpayer cannot enjoin the assessment or collection of taxes unless he can show: (1) that under no circumstances will the government prevail on the merits of its claim; and (2) that equity jurisdiction otherwise exists.

[1] Although 26 U.S.C. 6404 authorizes the Secretary of Treasury or his delegate to abate assessments, there is no requirement that he do so, and the district courts do not have jurisdiction to require him to do so. *Poretto* v. *Usry*, 295 F. 2d 499 (C.A. 5), certiorari denied, 369 U.S. 810; *Etheridge* v. *United States*, 300 F. 2d 906 (C.A. D.C.). See *Graham* v. *Du Pont*, 262 U.S. 234. Moreover, a suit for the abatement of assessed federal taxes is simply a suit for injunctive relief. Such a suit is generally prohibited by the Anti-Injunction Act, 26 U.S.C. 7421(a), which bars suits to enjoin the assessment or collection of taxes.

Thus, the purpose of the Anti-Injunction Act is to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference" (416 U.S. at 736).

Petitioners argue that in *Bob Jones University* v. *Simon, supra*, 416 U.S. at 748, n. 22, and in *Alexander* v. *"Americans United" Inc., supra*, 416 U.S. at 757, n. 9, this Court left open the question of the range of relief, including injunctive relief, available in a suit for refund (Pet. 5-6). But the court of appeals correctly recognized (Pet. App. A, pp. 20-21) that the cited references indicate that this Court was primarily concerned with the range of remedies available *after* a final determination had been reached in a refund suit and not during the pendency of a refund suit.

Moreover, as both courts below properly concluded (Pet. App. A, pp. 23-24, 26), petitioners do not qualify for the exception to the Anti-Injunction Act established in *Enochs* v. *Williams Packing Co., supra*, 370 U.S. at 7, because they have not shown that under no circumstances could the government prevail on the merits of its claim. See *Bob Jones University* v. *Simon, supra*, 416 U.S. at 737. The question whether the United States can ultimately prevail must "be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Enochs* v. *Williams Packing Co., supra*, 370 U.S. at 7.

While petitioners claim that procedural defects in the assessment of the employment taxes, in the notices of assessment and in the demands for payment of the assessed taxes make their success on the merits a certainty, the district court found that they failed to present any evidence

supporting this argument (Pet. App. A. p. 26). There is accordingly no basis to their claim for injunctive relief.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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